Meeting of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction

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Strengthening national implementation: elements of an effective national export control system

Submitted by Australia, Canada, Germany, France, Japan, Netherlands, Spain and the United States of America

I. Introduction

1. The 2012 BWC Meeting of States Parties "reiterated calls for appropriate measures, including effective national export controls, by all States Parties to implement Article III, in order to ensure that direct and indirect transfers relevant to the Convention, to any recipient whatsoever, are authorized only when the intended use is for purposes not prohibited under the Convention." Well-designed and -implemented national controls are not only critical to fulfilling the obligations of Article III, they are also essential to implementing United Nations Security Council Resolution 1540, which decided that all UN Member States shall:

> *Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over [nuclear, chemical, or biological weapons, means of delivery, and related materials], including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.*

2. Appropriately designed and implemented controls are fully consistent with the requirements of Article X of the BWC and limited to non-proliferation measures, neither favoring the commercial development of industries nor hindering legitimate economic development of other countries. In practice, controls should affect only sales in the very

few cases where there is an unacceptable risk of diversion to, developing or maintaining a CBW capacity or terrorism.

3. While States Parties have strongly endorsed the need for effective national export controls, and many delegations have briefed on their national control systems, States Parties have not, to date, explored the question of what constitutes an "effective" system. While national systems may vary in many details, there are a series of attributes or elements common to effective control systems. Focused discussion by States Parties could therefore promote common understanding and effective action to strengthen national control systems, and thus implementation of the Convention.

II. Elements of an effective export control system

4. The purpose of BW-related export controls is to limit the risks of proliferation and terrorism involving biological weapons by requiring government permission for and oversight of transfers of tangible and intangible goods and technologies that could contribute to the development, production, or stockpiling of such weapons, consistent with Article III, typically through a licensing process. Such requirements should not be intended to impede legitimate trade or peaceful international cooperation that could not contribute to CBW activities or terrorism. To the contrary, by providing enhanced confidence that such exchange will be used for exclusively peaceful purposes, export controls serve to reduce levels of concern and enhance international exchange of life-science-related knowledge, equipment, and materials.

5. Effective systems for processing requests for government permission for transfers of tangible and intangible goods and technologies generally have six key components:

(a) Laws and regulations that are sufficiently clear and comprehensive, and that establish necessary legal authorities and appropriate penalties for violations;

(b) Clearly established procedures and mechanisms for appealing licensing decisions, investigating possible violations, and enforcing rules and penalties;

(c) A list of items subject to control that is clearly written and focused on the materials and technologies needed to develop, produce, or stockpile biological weapons, such as the list set out by the United Nations in S/2006/853 ("List of chemical and biological items, materials, equipment, goods and technologies related to other weapons of mass destruction programmes, as approved by the Committee pursuant to paragraph 8(a)(ii) of resolution 1718 (2006)"). Such lists should be regularly reviewed and updated as necessary.

(d) Controls on technology directly associated with listed items, including transfers of such technology in intangible form and via intangible means;

(e) A "catch-all" provision that obligates exporters to seek government permission for an export if they have reason, either from government communication or in the course of business, to suspect the export is intended to contribute to the development, production, or stockpiling of biological weapons; and

(f) Regular outreach to life science researchers and the biotechnology industry concerning these requirements to ensure awareness and compliance, e.g. through publication of regulatory handbooks and other guidance and resource documents, making such materials available online, and arranging or taking part in seminars and workshops to inform industry and academia.

III. Factors for consideration in making a licensing decision

6. It is important to bear in mind that the vast majority of global trade in dual-use items and biotechnology is legitimate, so government permission to export is only seldom denied under these regulations. However, since those seeking to acquire materials for biological weapons purposes are unlikely to declare their intentions, the stated peaceful use of a proposed transfer, and the stated end user, cannot automatically be taken at face value. Officials evaluating requests for government permission to export BW-relevant items should therefore take into account indicators of proliferation risk, such as:

(a) Information about proliferation and terrorism involving biological weapons, including any proliferation- or terrorism-related activity, or information about the involvement of any of the parties to the transaction in clandestine or illegal procurement activities;

(b) The significance of the transfer in terms of (1) the appropriateness of the stated end-use (e.g., consistency of the item with the stated end-use, and the consistency of both with the stated end-user), including any relevant assurances submitted by the recipient state or end-user, (2) the other possible civil and military applications of the item, and (3) the potential development of biological weapons

(c) The assessment of the end-use of the transfer, including whether a transfer has been previously denied to the end-user, whether the end-user has diverted for unauthorized purposes any transfer previously authorized, and, to the extent possible, whether the end-user is capable of securely handling and storing the item transferred;

(d) The role of distributors, brokers, or other intermediaries in the transfer, including, where appropriate, their ability to provide authenticated documents specifying the importer and ultimate end-user of the items to be transferred, as well as the credibility of assurances that the items will reach their stated end-users;

(e) The capabilities and objectives of the chemical and biological activities of the recipient state and the extent and effectiveness of the export control system of the recipient state, as well as any intermediate states;

(f) The applicability of relevant multilateral agreements or sanctions, including the BWC.

IV. Conclusion

7. National export control systems that incorporate the six key elements described above are increasingly widespread among BWC States Parties – but unfortunately not yet ubiquitous. Many states' systems possess some of these characteristics, but not others (for example, a state may have high-quality laws and regulations, but lack enforcement capacity, or have enforcement capacity but be hampered by insufficient legal authorities). BWC States Parties could make a substantial contribution to strengthening implementation of the BWC and to international security by adoption a clear "common understanding" that these six components are core elements of the effective national export controls called for by the 2012 Meeting of States Parties.

8. States Parties could take a further important step toward effective action by agreeing upon a "common understanding" that the six indicators of proliferation risk cited above, which are widely recognized as international best practice, should be taken into account by States Parties in making licensing decisions for the export of BW-relevant items.